Justice and Freedom

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IT is easy to fix one's attention on what seems to be an abuse and to attack it with such an emphasis as to make it stand out in a bold and bald and naked form, without the proper shading and without a statement of mitigating circumstances. What one says may be true in letter and yet because of the failure to note the other side may be unjust and false in spirit and effect. On any issue which affects the vital interests of classes in a community, we must expect such partisan statements, and we must realize the difficulty of getting at a truthful and judicial summing up of the controversy and a just conclusion. Not only is the problem of reaching the truth a difficult one in itself, but it is also attended by embarrassment that in such a heated controversy the one who seeks the median line and to hold the balance even, is generally condemned by both sides for his pains.

Competition Essential to Progress

This general observation as to all controversies finds a most noteworthy illustration in the continuing issue between capital and labor. Our present society with the institutions of personal freedom, civil liberty, and private property finds its moving and basic spirit in competition. Without this we would make no progress. Without this the prudential virtues, industry, effort, self-restraint would all abate and retrogression would take the place of progress. Between those who control capital there must be competition in some form, or its use will cease to be directed in the spirit of wisdom, energy and progressive ingenuity. The spirit of competition in the reduction of the cost of production has led to great combinations of the small contributions of capital from the many who have saved, in a reservoir to be controlled by the comparatively few leaders. This principle of combination has given great power to the leaders and at times they have been intoxicated with the lust for greater power and an absolute control of capital in different lines of industry and the elimination of competition. This is an excessive use of their power and needs curbing, and the Anti-Trust Law was enacted to prevent this abuse. There can be an excessive spirit of competition and that rule or ruin policy which is both

suicidal for those who initiate it and destructive for those against whom it is directed. It can only be modified by the common sense that prompts self-preservation and the principle of live and let live. Then there is a competition between individuals of the labor class. This persists no matter how iron the rules of the labor unions. The terms of employment are ultimately fixed by the law of supply and demand and by the competition between laborers. Organized labor does not generally include all of those engaged in labor even in skilled trades. Then in the fixing of the union wages and within the union itself, the spirit of competition between members has a necessary influence.

Then there is competition between the classes. It is a normal condition that there should be an ever-recurring issue between those who pay wages and those who earn them as to what should be the just share of labor in the joint product of labor and capital. This controversy must be kept within the limits of moderation, to be fixed by rules of law and by the good sense of both sides, prompted by the consciousness that both capitalists and wage earners are in the same boat with the whole community and that continued injustice to one class is certain to injure the whole of society. This controversy must recur even when the beneficial co-operative system of dividend sharing prevails.

This issue affects so closely the interests of those engaged in it, we must expect an exhibition of intense partisanship, and we must expect also a pressing upon the limits of law and common sense in the effort of each side to secure what it deems its right.

Purposes of the Clayton and Trade Commission Acts

A consideration of the Clayton Act and of the Trade Commission Act, which are really to be taken together, and a discussion of their legal effect and of their wisdom and expediency, necessarily involve the issues growing out of this competition between capitalists and its effect upon the public weal, of the competition between laborers and its effect upon the freedom and effectiveness of labor and the better condition of the individual laborer, and of the struggle between capital and labor in the effort to settle the share of their joint product. What I would like to do tonight is to give as nearly a judicial expression upon these issues as one can who is neither a capitalist nor a wage earner, and who thinks he has at heart the welfare of society. As I have already indicated, an attempt to do this will arouse criticism by those engaged in the management of capital, that a man who has not been in business has no practical knowledge making valuable his views of laws concerning business. The criticism by the leaders of wage earners will be that it is the expression of one affected by class consciousness, though

just exactly what class it is of which one is conscious may be doubtful. We usually find in such heated denunciation that class consciousness is intended to describe an absence of the partisan spirit which the denouncer has. While the attitude of hostility of both sides toward a judicial expression may weaken its influence, at the same time, it may be significant of its justice.

The first thing to be noticed with respect to the Clayton Act and the Trade Commission Act is that it reaffirms the Anti-Trust Act. Section 7 of that Act in denouncing certain Acts intended to lessen competition contains the proviso that:

"Nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the Anti-Trust Laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided."

And Section 11 of the Trade Commission Act is:

"Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the Anti-Trust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify or repeal the said Anti-Trust Acts or the Acts to regulate commerce or any part or parts thereof."

Now there is a studied effort, by gentlemen who are defendants in pending suits under the Anti-Trust Act, to discredit the beneficial effect of that Act, to hold it up to criticism, to make it responsible for depression in business, and to attack it as an archaic effort to prevent material progress. The arguments that these gentlemen advance, and the plea for co-operation instead of competition, are nothing but a euphemistic defense of bringing our whole industrial system again under the monopolistic control of a few managers, with the inevitable result that we must regulate this monopoly by national direction, involving price-fixing and as complete control of all business as we now have over interstate railroads. To this I am utterly opposed. While I concede that the public nature of the function which the railroads of the country perform involves in some degree a necessary monopoly under public franchise, and therefore requires regulation, we must all concede that the duty assumed by the Government and discharged by the Interstate Commerce Commission is one that is imperfectly performed, and frequently results in injustice, and an injurious constraint. If now we were to extend such Governmental control to all the lines of business industry which are not dependent upon public franchise and attempt to regulate in minute detail that business, and fix prices, our machinery would break down, because of the immense field to be covered and the inherent difficulty of substituting the arbitrary judgment of men for the inexorable operation of economic law. The anti-trust law, as it is enforced today, is the result of a construction of 20 years by a wise, patriotic and impartial tribunal, the greatest in the world, a tribunal which

has had the benefit of the experience of 20 years in the life of the law, and which gives, in its construction of the law, proper weight to the effect of dominant and well settled public opinion demanding its enactment and stimulating its enforcement. An agitation to secure its repeal and a return to the conditions of industry under monopolistic control before it was made effective by the construction of the courts, is utterly futile and will meet no success with any Congress that represents the people in its action; and certainly not at the instance of those whose conduct of their business has invoked Governmental action because of their alleged violation of the law's restrictions. It is not too much to say, therefore, that the Clayton Act and the Trade Commission Act, in so far as they confirm the Anti-Trust Act, are only expressing the opinion of all but comparatively few.

Legislative Hostility to Business Success

My objections to the Clayton Act and the Trade Commission Act are that their enactment with such a blare of trumpets and avowals of hostility to capital in general, with little discrimination, had a strong tendency to frighten those whose judgment determines the amount of new investments of capital, and thus to restrict the normal expansion in our business due to the reinvestment of earnings. It is a mistake to suppose that capital is all owned by rich men. It is made up chiefly of the savings that flow into the great reservoirs of savings banks, life insurance companies, trust companies, into the stock of railroad enterprises and industrial corporations; and the very large percentage of the total capital invested is owned by wage earners, earners of salaries, and men of small or moderate means, who use these agencies to secure profit for their savings and a reward for their prudence and self-restraint. It is true, however, that in giving effect to the principle of combination the control of these reservoirs of capital and the reinvestment of its profits on invested capital, are more or less subject to the judgment of the comparatively few to whose custody and management the reservoirs are entrusted. The aftermath of a crusade and great reform in our political and business condition and a rescue of the country from the dangers of plutocracy is excessive hostility in legislative expression to success in business and to those who control capital. The hostility has been manifested in all sorts of restrictions, unwise and useless, and the enactment of further restraints in the Clayton Act and in the Trade Commission Act were much more detrimental to the business interests of the country in frightening investment than in any real effect after they shall have passed the scrutiny of the courts and their essence has been disclosed in the test of actual litigation. There was in their enactment a political motive that prompted the claim on the part of those who voted for them

that they were much more radical than they are. A close examination of the Clayton Act shows that while it divides up the offenses denounced by the Anti-Trust Act, into a variety of details, it really adds but little in its practical restriction of methods of conducting business and the freedom of combination and the freedom of competition. It adds a useful provision to the law in denouncing as a Federal crime the looting of interstate railroads by reckless promoting directors charged with the duty of honest, careful management in the interests of their stockholders and the public, offenses which had theretofore been denounced only by State laws. The bringing of this offense within Federal jurisdiction, because of the greater certainty of enforcement in the Federal courts, will make less likely such mismanagement as that which has been disclosed to the country in a number of our great railway corporations.

Trade Commission Act Attempts the Impossible

In the Trade Commission Act a Federal executive tribunal has been created whose duty it is to keep under detailed observation the entire industrial and commercial business of the country, other than that of interstate railroads, and wherever it detects unfair methods of competition, to summon the perpetrators before it on charges, to give a hearing to make a finding of facts and conclusions of law, and to issue an order to correct such methods, and then, if their conclusions are disputed and their order is disobeyed, to submit the record to the courts for a consideration of the legality of the order. There are two thoughts that occur to one in respect to this provision of this new legislation. One is that the field committed to the jurisdiction of this Federal Executive tribunal is so wide, indeed so much wider than that of the Interstate Commerce Commission, which is already weighted down with its duties, that the Act essays to do something that is utterly impossible of performance. This will be seen more clearly to be true when we consider that everything that it has to do must be subjected to the courts before it has in any degree effective sanction and enforcement. We all remember how the interstate commerce jurisdiction utterly failed when it was obliged to submit its orders and its judgments to a court and ask judicial enforcement involving further controversy and delay of several years.

Second, the Commission is given power to determine whether in interstate business covering this wide field, particular methods of competition are unfair. If this is intended to authorize the Commission to formulate new restrictions upon business, which in its judgment ought to be restrained, it is certainly a delegation of legislative authority which Congress has no Constitutional power to delegate to it. It is reasonable to suppose that when the court comes to determine what an unfair method of competition is,

it will look to the rules of law and to the statutes of the United States for guidance, and it will keep the Trade Commission within the path thus limited. In other words, what the Trade Commission will have to do is to confine itself in determining the existence of unfair methods of competition to those which violate our present law; that is, to the restrictions of the Anti-Trust Act. It becomes, therefore, nothing but a tribunal of investigation for reporting facts and the application of the law which can only be made by the confirmation of the court. In other words, it is nothing but a glorified bureau of corporations with larger salaries and greater powers of investigation. It is fortunate that the power thus conveyed is not really larger, because the standing and national reputation of the men who have been appointed to fill these large salaried positions as members of the Board are not such as to give great public confidence in their experience or judgment. Not one of them can be said to have had national standing as a business man, or as a lawyer; and while the standard suggested for this Commission when its creation was recommended was that of judges of our National Supreme Court, I regret to say that it has not been met in the actual selection of the Board. While, therefore, the powers of the Board will not in my judgment under the construction of the courts prove to be as formidable as they were heralded to be by those who passed the Act and those who proclaimed a new freedom in business, the thundering in the index, together with the passage of the Act, has had the result of making capital more timid, of restraining investment, of decreasing the wage fund, and of throwing upon those least able to bear it the burden of business depression. The Act, moreover, does furnish to these Trade Commissioners inquisitorial powers of very doubtful wisdom and utility.

The fourth amendment to the Federal Constitution, passed at the instance of Thomas Jefferson, contains the provision that—

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

That amendment recognizes a principle of government that had approved itself to the British people and was confirmed by the American people in the framing of their Constitution. Now while it is quite possible that the provisions of the Trade Commission Act may not be of such a character as to violate this constitutional guaranty, they do have a tendency to bring about the evil against which this amendment was directed. We have heard a great deal about pitiless publicity, and we have noted the eagerness with which legislators rush into investigations for political purposes and at public expense. The history of the investigations by the Democratic House of the last Administration, if anyone had the time to

summarize it, would show a waste of public money, a waste of Governmental efficiency and a series of personal injustices done through the instrumentality of partisan investigation that would bring to the minds of judicious men the importance of not going to extremes in the inquisitorial methods for the investigation of private business to which this Trade Commission Act tends. Fear of the excessive and unjust use of this innovation in the law is a legislative cause for alarm to the business interests of the country. On the whole, however, my own judgment is that the Clayton Act and the Trade Commission Act add very little to the effectiveness of the Anti-Trust Act.

One of the greatest objections to them is the construction and effect of the anti-trust law have been settled by twenty years of litigation and consideration by the Supreme Court, and they will now require another decade of litigation to show that they have not added to the scope or material effect of that Act.

Clayton Act was Passed for Political Reasons

The Clayton Act deals also with the controversy between capital and labor. Into that controversy, by reason of its history, the power of the Federal Courts to issue injunctions, to protect business and property against unlawful invasion necessarily thrusts itself. The Clayton Act has done a good thing in formulating the proper procedure in the issuing of preliminary injunctions without notice in all cases where such extraordinary remedy is needed. Its provisions with respect to the violations of the Anti-Trust Act by labor organizations and agricultural associations have been proclaimed as a great charter for the freedom of labor in its controversy with capital. It was passed for political purposes, to satisfy the demands of the leaders of the American Federation of Labor, with the hope of securing the vote of the labor organizations at subsequent elections. The vote of every member of Congress and of the Senate was noted, and those who were adverse were marked down as unfair to labor and were threatened with punishment by members of the labor unions at the polls. I do not object to this holding members of Congress and of Senators to a responsibility for their votes. It is the right of every American citizen to demand of his representative that he shall conform to his views of national policy or else lose his support whenever he seeks a renewal of his mandate of representation. What I do object to is the cowardice of representatives who yield their own convictions as to how they ought to vote on such measures in fear of the organized power of the unions in their respective districts and States. What I also object to is the hypocrisy and unfairness in denouncing the legitimate use of arguments by other classes in the community to induce members of Congress and Senators to favor or

oppose legislation in which such classes are interested by proper organization and proper arguments as "vicious lobbies" to be condemned without stint. Nothing is so unfair and unwise as to enact legislation that seriously affects the property and business interests of a class without giving to that class the fullest opportunity to be heard, whether their cause is a just one or not, and whether their interests are opposed to the public weal or not. It is begging the question and assuming a conclusion before hearing to denounce every activity in bringing their interests to the attention of Congress, by attacking them with an epithet and denying them a hearing by a muckraking denunciation of their motive.

Violations of Anti-Trust Act Still Punishable

I have not time to state in detail the effect of the Clayton Act upon the remedies which may be resorted to in controversies between capital and labor, to constrain the methods used by either side in the controversy within lawful limits. I can only state shortly that in my judgment, after a close examination of the Act, especially of Section 6, and the limitations upon the cases in which injunctions can issue in labor disputes, that a labor organization or an agricultural association which violates the Anti-Trust Act by injury to business or property of the employer, by violence or crime, or by the use of what is called the compound boycott (that is, by bringing into the controversy material-men and customers through threat of boycott against them unless they cease association with the employer), are still subject to civil action, equitable restraint or criminal prosecution under the Anti-Trust Act. The case of Loewe against Lawler, known as the Danbury Hatters' case, in my judgment would have had exactly the same result under the existing legislation as it had under the Anti-Trust Law before it was supplemented by the Clayton Act. In cases brought by individual employers seeking injunction, contempts of the order of injunction are to be tried by a jury where that which is restrained is a crime; but where it is not a criminal offense, the procedure as to contempts remains the same as before. Where the action is brought by the Government to restrain violation of the Anti-Trust Act, the procedure in contempts is in all cases exactly as it always was. The practice which was followed in the Debs case, *i. e.*, a hearing without a jury, would, if the Debs case were to re-occur, be followed today.

This limited effect of the Clayton Act is satisfactory to those who are in favor of complete remedies for any wrong whether committed by labor unions or by employers. The effect may, however, not be seen clearly until the courts have had occasion to construe the Act. The evil of the excessive

claims as to the effect of the Act which its political promoters have made, will be found in the attacks made upon the courts for their proper construction of the language used. The claimants of political favor of labor unionists based on the passage of the Act will be loudest in such attacks.

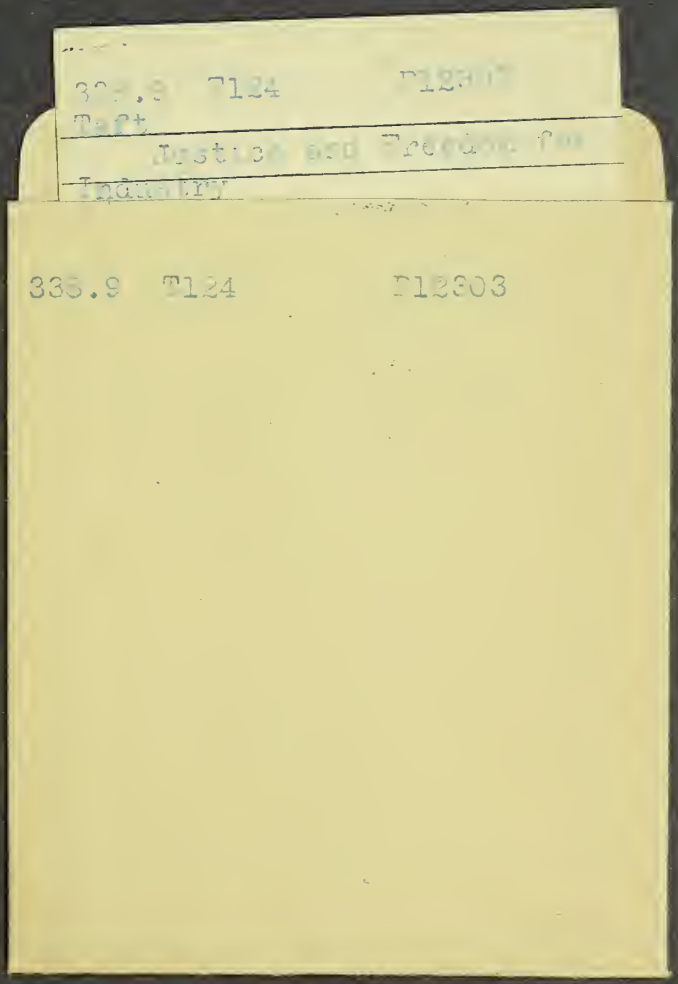
Union Labor Leaders Intoxicated with Power

The power that the leaders of the American Federation of Labor exercise has become excessive and detrimental to the public weal and the good of society, and especially of that of the members of the labor unions. I fully approve the principle of labor unions. I believe that they are essential in creating a state of equality of dealing between employees and employers. I believe that they have made possible the enactment of a great deal of most healthful and useful legislation and have greatly aided the just cause of wage earners in this regard. But the power their leaders have acquired by the principle of combination in their organization has intoxicated them, and they have exercised a tyranny over society and over their own members that is certainly leading to a reaction and to a restraint of their great powers within proper and lawful limits. They have failed to condemn in any way as they ought, the use of criminal methods to which in a lawless spirit, their representatives at various times have seen fit to resort. They have raised large funds in the defense of men who have proven to be by their own confessions, violators of the criminal law, and they have manifested a desire to secure in express statutory declarations, an immunity for labor unions from the operation of general laws that should be uniform. In other words, they have sought to make themselves and their agents a privileged class, not subject to the laws that affect every other man, and even themselves when not engaged in labor disputes. We must, of course, concede that many of the leaders would be glad to utter protests and interfere with these illegal methods that have been pursued, but there are politics within labor unions and labor union conventions, and the loudest and most violent extremists are too often elements to be reckoned with in maintaining the leadership of such unions. The quiet, sensible, conservative members of the union, of whom there are many more than we realize, do not exercise the influence to which their numbers would often entitle them. Such members manifest their opinions in elections where in the secrecy of the election booth they vote their real opinions and often refuse to obey the formal declarations of political policy made under the influence of the conspicuous labor leaders.

The case of Loewe *vs.* Lawler in the sequel to the judgment has much significance. One hundred and eighty-six defendants with their houses and earnings, subject to the satisfaction of a judgment for more than $250,000, are now appealing

to the United Hatters' Union and to the American Federation of Labor, who spurred them on to their lawless methods, to aid them in the payment of the result of this law suit which was vigorously defended at the instance of the leaders of these organizations, in the avowed interest of organized labor. Neither the Hatters' Union nor the American Federation of Labor is willing to raise a fund to relieve these 186 victims of their misguided urging although they could and did raise funds quite as large for the defense of criminals who subsequently confessed their crimes committed in the supposed upholding of the interests of labor. Such a condition can not but have a useful influence in bringing to the attention of the rank and file of organized labor, the necessity for restraining their leaders in such unwise defiance of the law, and in confining themselves to wise, moderate and lawful methods of maintaining their cause against the opposing interests of capital and employers.

What is needed to produce a sobering effect upon the truculent labor leaders, intoxicated with their sense of political power, is political courage on the part of those who seek to represent the people in legis[illegible] and executive offices and a full and fair discussion of suc[illegible]n- gress and the [illegible]n, when in such [illegible]ue privilege is to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